No. 11,853

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ARIZONA BARITE COMPANY
(a corporation),
Appellant,

vs.

WESTERN-KNAPP ENGINEERING CO.
(a corporation),
Appellee.

BRIEF FOR APPELLEE.

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STATEMENT OF JURISDICTION.

This is an appeal from two orders of the United States District Court for the District of Arizona, one entered October 6, 1947 (Tr. p. 27), quashing service and return of process (Tr. p. 14), on one J. P. Keller, formerly statutory agent for the appellee in Arizona for the service of process, the other entered December 29, 1947 (Tr. p. 32), quashing service and return of process (Tr. p. 29) on the Secretary of the Arizona Corporation Commission.

BRIEF OF ARGUMENT.

Appellee argues (1) that this Court is without jurisdiction to entertain and hear an appeal from the two orders quashing service and return because they are not final; (2) that the attempted service on the statutory agent of appellee was ineffectual because the agent's designation and authority had been revoked and the appellee corporation dissolved in the state of its domicile before such service; and (3) that, for the same reason of dissolution, the attempted service on the Arizona Corporation Commission was ineffectual, and for the further reason that the attempted service on that commission did not comply with the Arizona statute under which the attempted service was made.

ARGUMENT.

(1) JURISDICTION.

The orders appealed from (quashing service and return of process) are not final orders within the meaning of Section 128 of the Judicial Code, as amended, 28 USCA, Section 225, and do not come within the exceptions of Section 227, thereof and therefore are not appealable to this Court.

The orders do not terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance, the court below would have nothing to do but to execute the judgment or decree it had already rendered, and are therefore not final.

O'Brien, Manual of Federal Appellate Procedure, Third Edition, 1941, p. 25, (note 3);

Georgia Ry. etc. Co. v. Decatur, 262 U. S. 432, 437, 43 S. Ct. 613, 67 L. Ed. 1065;

Cole v. Rustgard (CCA 9), 68 Fed. (2d) 316.

In the last cited case, this Court said that where service has been quashed, the appellant may have alias summons issued and proceed with his suit.

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(2) SPECIFICATION OF ERROR NO. 1.—THE QUASHING OF SERVICE AND RETURN OF PROCESS UPON STATUTORY AGENT.

For the purpose of argument under this Number (2) and the following Number (3), it may be reiterated that a corporation, in almost all the states after dissolution remains in existence for the purpose of winding up its affairs. This is so in California, the domicile of the appellee corporation, by elaborate provisions in Sections 399, 400, and 400a of the California Civil Code. And in Arizona by Section 53-308 of Arizona Code Annotated, 1939, "corporations whose charters have expired, or which have been dissolved by the voluntary act of the stockholders, may continue to act for the purpose of winding up their affairs."

But statutes providing for the continued existence of a dissolved corporation for purposes of suit do not apply to foreign corporations.

Coffin v. Harris-Woodbury Lumber Co., 187 Fed. 1005, affirming 179 Fed. 257;

Robinson v. Mutual Reserve Life Ins. Co., 182 Fed. 850;

Dundee Mortgage & Trust Inv. Co. v. Hughes, 89 Fed. 182;

Marion Phosphate Co. v. Perry, 74 Fed. 425, 33 L.R.A. 252;

Fitts v. National Life Ass'n, 130 Ala. 413, 30 So. 374;

Olds v. City Trust, Safe Dep. & Surety Co., 185 Mass. 500, 70 N. E. 1022, 102 Am. St. Rep. 356;

Wamsley v. H. L. Horton & Co., 153 N. Y. 687, 48 N. E. 1107 (memo), affirming 12 App. Div. 312, 42 N. Y. Supp. 767;

Riddell v. Rochester German Ins. Co., 35 R. I. 45, 85 Atl. 273;

Clinton v. Coppedge, 2 Fed. Supp. 935, 939;

Ex parte Davis, 250 Ala. 668, 162 So. 306;

Fidelity Metals Corp. v. Risley (Cal. App.), 175 Pac. (2d) 592.

And a corporation, after having been dissolved in the state of its creation, cannot be sued in another state.

Mumma v. Potomac Co., 8 Pet. 281, 284; 8 L. Ed. 945;

Robinson v. Mutual Reserve Fund Life Ins. Co., supra;

Marion Phosphate Co. v. Perry, supra;

Fitts v. National Life Ass'n, supra (even though there is property within the state);

Remington & Sons v. Samana Bay Co., 140 Mass. 494, 5 N. E. 292;

Martyne v. American Union Fire Ins. Co. of Philadelphia, 216 N. Y. 183, 110 N. E. 502;

Wamsley v. H. L. Horton & Co., supra;
Merchants Loan & Trust Co. v. Clair, 107 N.Y. 663, 14 N. E. 414;
Fidelity Metals Corp. v. Risley, supra;
Chaplin v. Selznick, 293 N. Y. 529, 58 N. E. (2d) 719.

Ordinarily a foreign corporation may revoke its agency in the state and thereafter process cannot be served upon the agent.

United etc., Co. v. Wisconsin, etc. Co., 44 Mont. 343, 119 Pac. 796.

This case, last cited, was decided under a statute that provided that the designation by a foreign corporation of an agent for the service of process might be revoked. The Arizona statute makes no such specific provision, but it does allude to such revocation. Section 53-307, Arizona Code Annotated 1939, provides that "Whenever any corporation * * * shall revoke or attempt to revoke the appointment of the statutory agent without duly appointing another in his place; * * * the attorney general or such corporation, or any stockholder or officer thereof may maintain an action" to dissolve the corporation.

This Arizona statute above quoted refers to domestic corporations, but the statute, Section 53-801, relating to foreign corporations, requires any foreign corporation to appoint "a statutory agent", without defining a statutory agent, but using the same phrase as in the domestic corporation law, in the same way. And it will be noted Section 53-307, supra, applies to "*any* corporation".

We find no Arizona decision directly in point. But the Arizona Court, in *Southwest Metals Co. v. Snedaker,* 59 Ariz. 374, 386-7, 129 P. (2d) 314 (also cited by appellant), came close to it. The Court says: "A more serious question involved, however, is whether the agent, having been duly appointed, may resign and refuse to act in that capacity, so that notwithstanding the appointment has never been formally revoked, a publication of summons is valid. (Note: Service was attempted by publication, one of the requisites of which was that the corporation had no legally appointed and constituted agent in the state.) There are a number of cases where this question has arisen. * * * Our statute, however, is silent upon the question as to how the agent may resign or be removed. Section 53-305, Arizona Code 1939. In the cases of *Gerrick & Gerrick Co. v. Llewellyn Iron Works,* 105 Wash. 98, 177 Pac. 692, and *Forrest v. Pittsburgh Bridge Co.* (C.C.A. 7), 116 Fed. 357, it was held, in substance, that where the statute did not expressly provide a manner in which the revocation of the authority of the statutory agent might be made, when the agent resigned or refused to act, service upon the agent was not either necessary or, indeed, valid. The Court held that J. H. Morgan, the designated agent, having refused to act, the corporation had no agent in the state, legally appointed and constituted.

If the corporation had no statutory agent when the agent resigned or refused to act, it would have none when his appointment was revoked, and the Arizona

statute, 53-307 supra, contemplates revocation else it would be meaningless. And the Arizona Supreme Court, in *Southwest Metals Co. v. Snedaker* above, implied that if the appointment of agent had been formally revoked the plaintiff would have had a basis for service by publication, having one of the requisites, to-wit, lack of an agent.

The Supreme Court of the United States has held that where designation of a statutory agent for service of process had been revoked and his authority terminated by the foreign corporation by a written instrument filed with the proper state officer, service could not thereafter be made upon the agent. The case was *People's Tobacco Company v. American Tobacco Company,* 246 U. S. 79, 62 L. Ed. 587, 38 S. Ct. 233, Ann. Cas. 1918C 537. It was a suit for treble damages under the Sherman Act of 1890. Suit was begun January 4, 1912, in the District Court of the United States for the Eastern District of Louisiana against the American Tobacco Co., a New York corporation. Summons was served upon one W. R. Irby on January 5, 1912. Up to November 30, 1911, the American Tobacco Co., the defendant, had a factory in New Orleans. It had filed in the office of the Secretary of State of the State of Louisiana an appointment of W. R. Irby as agent upon whom service of process might be made as was required by Louisiana state law. The defendant, American Tobacco Co., had been dissolved on November 16, 1911, and had revoked the authority of W. R. Irby as its resident agent by an instrument in writing filed on December 15, 1911,

in the office of the Secretary of State of Louisiana. W. R. Irby had ceased to be employed by the tobacco company after December 1, 1911. The Supreme Court of the United States, speaking through Mr. Justice Day, said, "We agree with the District Court that Irby, at the time of the attempted service upon him, was not the authorized agent of the American Tobacco Company. * * * We reach the conclusion that the District Court did not err in quashing the attempted service made upon it."

In the Iowa cases cited by appellant on page 12 of its brief, no question of foreign corporations appears to be involved. But in the Arizona case cited on page 13, there was such a question. And according to appellant's interpretation of that case (*Miller Rubber Co. v. Peggs,* 60 Ariz. 157, 132 P. (2d) 439), "the Court applied the rule that the power of a corporation to sue after its dissolution depends upon the laws of the state of its incorporation". Likewise, the liability to be sued after its dissolution would depend upon the laws of the state of its incorporation,—in the case of appellee, the State of California, not the State of Arizona, and this despite Article 14, Section 5, of the Constitution of Arizona (p. iii, Appendix, Appellant's Brief).

If the laws of the state of its incorporation determined the appellee's liability to be sued, *a fortiori* the laws of the state of its incorporation would determine the persons to be served. Appellant's case of *Continental Oil Co. v. United States,* 14 Fed. Supp. 533, cited on page 14 of its brief and quoted from at the

top of page 15 implied that those persons would be the corporation's authorized officials at the date of dissolution. Certainly Mr. J. P. Keller, whose appointment had been revoked on June 6, 1946, was not an authorized official at the date of dissolution of appellee (January 3, 1947), or thereafter.

Appellant's brief on page 16 makes the statement "Certainly no domestic corporation can, under Arizona statutes, voluntarily dissolve without satisfying its creditors." Aside from the fact that appellant is not yet a creditor of the appellee, a corporation of the State of California, whose laws govern appellee and its dissolution, cannot voluntarily dissolve without satisfying its creditors. In this connection reference is made to the Certificate of Winding Up and Dissolution of Western-Knapp Engineering Co., a California corporation (Tr. pp. 23, 24), reciting notice of winding up to "all its known creditors and claimants" in accordance with Section 400a of the Civil Code, and reciting that its known debts and liabilities were actually paid or adequately provided for. Under this state of facts, it does not follow that appellee withdrew from Arizona as a part of a design calculated to avoid its obligation (if any) (Tr. p. 3) or to lightly shove aside its contractual obligations. (Appellee's Brief, p. 16.) Many reasons exist for corporate dissolutions, for example, tax reasons. This argument of appellee is a *non sequitur,* except for its allegation in its complaint on page 3 of the transcript, as yet unanswered, of course, by the defendant-appellee.

Appellant's case of *Frazier v. Steel & Tube Co.,* cited and discussed on page 18 of its brief, as we read it, held that revocation of an agent's authority does not take place by withdrawal from the state. The case is not in point as to facts, for in the instant case, the agent's authority was revoked by an instrument in writing filed with the Corporation Commission, long before dissolution. Moreover in the instant case the defendant foreign corporation was dissolved and had ceased to exist. In the *Frazier v. Steel Co.* case, the defendant had not been dissolved. It was still in existence.

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(3) SPECIFICATION OF ERROR NO. 2.—THE QUASHING OF SERVICE AND RETURN OF PROCESS UPON ARIZONA CORPORATION COMMISSION.

In *Robinson v. Mutual Reserve Life Ins. Co.,* 182 Fed. 850, 855, the Court said:

> "Cases which hold that service upon an official agent of the state brings the company into court, even after it has ceased to do business in the state, like Woodward v. Mutual Reserve Co., 178 N. Y. 485; 71 N. E. 10; 102 Am. St. Rep. 519 affirmed in 200 U. S. 612, 26 Sup. Ct. 752, 50 L. Ed. 620, do not apply to a company which has ceased to exist."

The *Woodward* case was cited by the West Virginia Court in support of *Frazier v. Steel & Tube Co.,* which is so heavily relied on by appellant. In the *Frazier* case the defendant corporation merely withdrew from the state; it had not ceased to exist.

It has been held, however, in Louisiana that even withdrawal by a foreign corporation would be sufficient to vitiate service upon the Secretary of State of Louisiana. *Gouner v. Missouri Valley Bridge & Iron Company,* 123 La. 964, 49 So. 657.

But there are other reasons why the Court did not err in quashing service upon the Corporation Commission of Arizona. The attempt to serve that commission was made under Sec. 21-314, Arizona Code 1939. (See p. 19 of Appellant's brief and pp. ii and iii of the Appendix thereto.) That section provides that "When a domestic corporation does not have an officer or agent in this state upon whom legal service of process can be made" service may be made upon the Commission. This sort of service is bottomed upon a matter of fact, namely, that the corporation "does not have an officer or agent, etc." and the section goes on to provide how that fact shall be established, at least prima facie, by the return of the sheriff that diligent search or inquiry failed to turn up any such officer or agent. The return (Tr. p. 29) here fails to show any such fact in any way.

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(4) SPECIFICATIONS OF ERROR NO. 1 AND NO. 2 GENERALLY.

Appellant argues from Article 14, Sec. 5 of the Arizona Constitution, that the Appellee had an agent in Arizona on whom process could be served. Under the same article and section, it assumes as a matter of fact that appellee did not have an agent in Ari-

zona on whom process could be served. As we understand it, the claim is that the Arizona constitution makes ineffectual any withdrawal, dissolution, or revocation so far as the statutory agent is concerned, and that therefore the appellee still has an agent in the state upon whom process was effectually served. But on the other hand, the claim is that the Arizona constitution makes a domestic corporation out of the appellee, and that, as a matter of fact, the appellee had no agent upon whom legal service of process could be made.

If the first claim is true, Sec. 21-314 of the Arizona Code cannot apply, because it applies only where there is no agent. If the second claim is true, it was not shown as a matter of fact that the appellee did not have an officer or agent within the state.

It is doubtful that the Section 5, Article 14 of the Arizona Constitution upon which appellant bottoms its case applies at all. That article seeks to put foreign corporations under the same conditions as domestic corporations as to transacting business. But does transacting business include litigation?

In the Arizona case of *Martin v. Bankers Trust Company,* 18 Ariz. 55, 62; 156 Pac. 87, 90, the Arizona Supreme Court said: "The prosecution of a suit in the court of this state is not carrying on a business, enterprise or occupation in this state within the meaning of the statutory provision" for qualification in Arizona of a foreign corporation, citing 19 Cyc. 1279-80, which on page 1280 under the letter "I"

note 13 states that defending suits does not constitute doing business in a state. See also 20 C.J.S., p. 52, Corporations, Sec. 1836, n. 27, and p. 83, Sec. 1859.

That the prosecution of a suit was not doing business was held under an amendment to the statute adding the words "do or transact" any business, in *McKee v. Stewart Land & Livestock Co.,* 28 Ariz. 511, 238 Pac. 326, and in *Monaghan & Murphy Bank v. Davis,* 27 Ariz. 532, 537; 234 Pac. 818, 820.

Although plaintiff's complaint states that appellee withdrew from doing business in Arizona and revoked the appointment of its statutory agent on May 6, 1946, (Tr. p. 3), the record shows that the withdrawal and revocation was not filed in the office of the Arizona Corporation Commission until June 6, 1946 (Tr. pp. 25, 26), more than a month after appellant's cause of action arose, (Tr. p. 8), and that appellee corporation was not finally dissolved until December 31, 1946, when the certificate of dissolution was signed (Tr. p. 24), or January 3, 1947, when it was filed in the office of the Secretary of State of the State of California, (Tr. p. 23). Appellant thus had ample time, even under its own theory of the case, to have asserted its cause of action and to have served J. P. Keller, the agent, before the appellee corporation ceased to exist. Appellant still may assert its alleged cause of action in or under the laws of the State of California as pointed out above and has not yet begun to exhaust its remedies or the possibility of proper service of process.

We therefore respectfully submit that the appeal herein should be dismissed or that the orders appealed from should be affirmed.

Dated, May 17, 1948.

Respectfully submitted,

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